

Serial: 189342

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-M-00937

**FREDDIE WEBBER, JR. A/K/A FREDDIE LEE
WEBBER, JR. A/K/A HEAD A/K/A FNU LNU**

v.

STATE OF MISSISSIPPI

FILED

APR 17 2014

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SUPREME COURT
COURT OF APPEALS

ORDER

This matter comes before the Court, *en banc*, on Freddie Webber, Jr.'s *pro se* Motion for Post-Conviction Collateral Relief, request to proceed *in forma pauperis*, Motion to Amend, and request for the appointment of counsel. The State of Mississippi has filed a response in opposition to Webber's Motion for Post-Conviction Collateral Relief. Webber has filed a reply to that response, and the State has filed a second response.

Webber was convicted of sale or transfer of cocaine in the Lowndes County Circuit Court, and was sentenced as an habitual offender to thirty years' imprisonment without parole. Webber's conviction and sentence were affirmed by this Court. *Webber v. State*, 108 So. 2d 930 (Miss. 2013).¹ Webber did not raise any issues concerning the validity of his sentence on direct appeal.

Webber claims in his Motion for Post-Conviction Collateral Relief that his indictment was defective under *Gowdy v. State*, 56 So.3d 540 (Miss. 2010). Webber was not originally indicted as an habitual offender. Late on August 22, 2011, which was the day before trial

¹Lowndes County Circuit Court cause number 2010-0280-CR1. Supreme Court docket number 2012-KA-00115-SCT.

commenced, the State filed a Motion to Amend Indictment, seeking to amend Webber's indictment to charge him in accordance with Miss. Code Ann. § 99-19-83. The Motion to Amend Indictment listed five prior convictions of Webber from a single county in Florida, including a robbery conviction.

Webber's trial began on August 23, 2011, and continued on August 24. After the State's last witness in its case-in-chief was excused, the State informed the circuit court that it wanted to present the Motion to Amend Indictment. Defense counsel objected that the motion was not timely and that Webber was unfairly surprised, informing the court that he had not received the Motion to Amend Indictment until 4:00 p.m. on August 22. The trial court, on the record, orally granted the Motion to Amend Indictment. On August 24, 2011, the jury found Webber guilty of sale or transfer of cocaine. On August 25, 2011, a formal Order Amending Indictment to charge Webber as an habitual offender in accordance with Code Section 99-19-83 was signed by the trial judge and filed. But during a sentencing hearing on September 2, 2011, Webber was sentenced as an habitual offender under Miss. Code Ann. § 99-19-81, not under Miss. Code Ann. § 99-19-83. Defense counsel, in arguing against his client's being sentenced in accordance with the latter code section, apparently succeeded in convincing the trial judge that the State had provided no proof that Webber actually had served at least one year on each of the proffered Florida convictions, as required by that statute. It was during that hearing that the court instead allowed the indictment to be amended under a different habitual offender statute, Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83. The prosecution had not requested that Webber be sentenced under § 99-19-81 until it did so *ore tenus* during the sentencing hearing. Defense counsel,

who had received no notice that the State would seek to have Webber sentenced pursuant to § 99-19-81, interposed a timely objection. The trial court proceeded to sentence Webber to a term of thirty years' imprisonment in accordance with that statute, stating, "And that sentence is not to be reduced by any suspension or early release or parole."

In *Gowdy*, 56 So.3d at 545-46, this Court emphasized the directive of Uniform Rule of Circuit and County Court Practice 7.09 that "[a]mendment [of indictments] shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." After due consideration we find that Webber was unfairly surprised by the State's motion to amend the indictment to charge Webber as an habitual offender in accordance with § 99-19-83, and that in these circumstances the trial court erred in sentencing Webber as an habitual offender. This Court finds that Webber's Motion for Post-Conviction Collateral Relief should be granted as to this claim. We further find that Webber's sentence as a habitual offender under Miss. Code Ann. § 99-19-81 should be vacated, and this matter should be remanded to the Lowndes County Circuit Court for re-sentencing as a non-habitual offender for the crime of which the jury convicted him.

Webber's request to proceed *in forma pauperis* should be granted. Webber's request for the appointment of counsel should be granted to the extent that he is entitled to be represented by counsel at his new sentencing hearing.

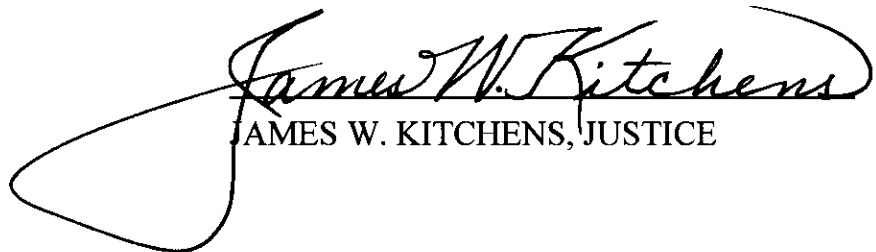
IT IS THEREFORE ORDERED that Freddie Webber, Jr.'s *pro se* Motion for Post-Conviction Collateral Relief is granted. Webber's sentence in Lowndes County Circuit Court cause number 2010-0280-CR1 is vacated, and this matter is remanded to the Lowndes

County Circuit Court for his re-sentencing as a non-habitual offender. All other claims raised by Webber are denied.

IT IS FURTHER ORDERED that Freddie Webber, Jr.'s request to proceed *in forma pauperis* is granted.

IT IS FURTHER ORDERED that Freddie Webber, Jr.'s request for the appointment of counsel is granted for purposes of his being represented by legal counsel during the re-sentencing process.

SO ORDERED, this the 14th day of April, 2014.


JAMES W. KITCHENS, JUSTICE

RANDOLPH, P.J., CONCURS IN RESULT ONLY. LAMAR, J., DISAGREES.